United Nations A/CN.9/817

General Assembly

Distr.: General
16 June 2014
English
Original: English and Spanish

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-18 July 2014

Online dispute resolution for cross-border electronic commerce transactions: Proposal by the Governments of Colombia, Kenya, Honduras and the United States of America

Note by the Secretariat

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I. Introduction

The Governments of Colombia, Kenya, Honduras and the United States of America submitted to the Secretariat the following text, which is reproduced below in the form in which it was received by the Secretariat.

II. Proposal by the Governments of Colombia, Kenya, Honduras and the United States of America

We request that the United Nations Commission on International Trade Law (UNCITRAL) direct the Working Group III on Online Dispute Resolution (ODR) to take into account the needs of developing countries and small and medium sized enterprises, in particular the need for an unconstrained online binding arbitration procedure to be available for the resolution of cross-border trade disputes.

UNCITRAL is developing generic rules for resolution of cross-border e-commerce business-to-business and business-to-consumer disputes. The Commission has twice directed the Working Group III to consider and report back

> "on how the rules respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process."[1]

Yet after two years and four working group sessions the Working Group still has not followed those instructions.

At the Commission session in July 2013 the delegations of Colombia, Kenya, Honduras and the U.S. presented a paper, UN Doc. A/CN.9/WG.III/WP.125,[2] requesting that the Commission further direct that the following considerations be addressed when assessing the needs of the micro small and medium sized enterprises (MSMEs) for final and binding arbitration:

1. The Rules should enable micro and small businesses to effectively reach international markets through electronic and mobile commerce;

2. The Rules should recognize that traditional judicial mechanisms are not an option for resolving cross-border e-commerce disputes;

3. The Rules should provide a clear and simple process that includes online arbitration of disputes so that sellers cannot avoid their responsibilities to dissatisfied buyers;

4. Online awards can and should be recognizable and enforceable under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), but counting on that mechanism alone is not sufficient;

5. The Rules should not give extraterritorial effects to domestic laws of one regional group that would operate as trade restrictions and require court

[1] Report of the 46th session, UN doc A/68/17, para. 222(a); Report of the 45th Session, UN Doc. A/68/17, para 79(a).

[2] Available at www.dropbox.com/s/ixtym2zsq4luom0/V1386013.pdf.

resolution of disputes and thus prohibit the effective operation of the ODR system for parties in other countries.

Because the Commission at its 2013 session did not address substantive subject matter issues, it was agreed that the substance of the proposal would be addressed at the next session of the Working Group. Yet, notwithstanding repeated requests to do so, the Working Group did not address WP 125 at either its December or April sessions.

These issues are of great importance. MSMEs are the key drivers of economic growth and job creation in both developing and developed economies. MSMEs stand to be among the main beneficiaries in any digital economy expansion, since the Internet has the potential to facilitate faster entry and participation for these businesses in the global economy. MSMEs have been identified as crucial to the post 2015 development agenda and the achievement of the sustainable development goals. It is envisaged that the funding of the SDGS will be commercial trade rather than development aid and the micro and small business hold the key to investments.

For MSMEs to effectively reach global electronic commerce markets, it will be essential to develop an enabling legal environment that fosters trust in cross-border electronic commerce transactions and provides a unified system for trade. A key component in establishing consumer and vendor confidence, and therefore enhancing the use of cross-border e-commerce for MSMEs, is the access to justice through binding online arbitration.

The position expressed above is supported by the informal consultations of the Secretariat with experts from multiple regions and with diverse practitioner and academic experience in relation to existing ODR practices and implications of those practices for the Rules (A/CN.9/801, para.28). Those experts concluded that:

> [B]oth consumers and business groups around the world are unanimous in seeking, fair, proportionate, effective, online, cross-border redress for low value cross-border disputes... . ODR administrators, marketplaces, and payment providers... want the flexibility to design, build, and deploy both non-binding and binding ODR systems.... [I]t would be very difficult for e-commerce merchants and marketplaces to track consumers and transactions on the basis of nationality and legal jurisdiction at the outset of a transaction... . [E]ach additional request for information in an online business transaction means customers lost... . [T]he Internet is borderless, and requiring private ODR entities to apply different rules (Track I or Track II) on the basis of nationality would be... commercially impractical and, in practice, unlikely to happen... . [M]erchants, marketplaces, and payment providers would be highly unlikely to implement any processes that require them to deploy two separate resolution processes for consumers from different geographies.

The experts further recommended that the Rules:

> [A]rticulate higher level process requirements and values (e.g., due process, transparency, impartiality) and limits as to when the rules apply (low value, type of disputes)[...].[3]

For these reasons we request that the Commission once again direct Working Group III on Online Dispute Resolution to take into account the needs of developing countries and small businesses, in particular the need for an unconstrained online binding arbitration procedure to be available for the resolution of cross-border trade disputes.

Additionally, we request that the Commission direct that a colloquium be held for three days in place of the fall session of the Working Group in order that experts with diverse practitioner and academic experience and with widespread geographical diversity may assess existing ODR practices and the implications of those practices and needs for the Rules, as well as the specific needs of MSMEs in developing countries.[4] The Working Group could then spend two additional days assessing the results of the colloquium.

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[3] The expert opinions were contained in a Note by the Secretariat presented at the Twenty-ninth session of Working Group III, A/CN.9/W.G.III/XXIX/CRP.2 (May 24, 2014). As further explained in the Note, "[a]t its twenty-eighth session (Vienna, 18-22 November 2013), the Working Group requested the Secretariat to prepare a report for a future session in relation to current practices in the online dispute resolution market (A/CN.9/795, para. 18)." The Secretariat Note is not available electronically but the sponsoring delegations of this paper will make it available to interested delegations upon request.

[4] According to one regional group, the experts employed by the Secretariat did not reflect a widespread geographical diversity.